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MEMORANDUM

To: Takoma Park City Council

Cc: Barbara Matthews, City Manager; Daryl Braithwaite, Public Works Director

From: Kenneth Sigman, Asst. City Attorney

Subject: Response to October 19, 2007, comments of Catherine Tunis regarding the Tree Ordinance

Date: October 22, 2007

Introduction

I am writing to respond to the comments of Catherine Tunis regarding the intent and interpretation of the Tree Ordinance. Ms. Tunis asserts that the original intent of the Tree Ordinance, since its adoption in the 1980s, and continuing through its comprehensive revision in 2003, has been that the Tree Commission is not to render final decisions on tree permit or tree protection plan permits (hereinafter, “permit” and “tree permit” shall refer to both types of permits) unless the Commission decides to deny a permit.

Discussion

The City has faithfully adhered to the express language and intent of the Tree Ordinance.

My opinion is that the Code provides that the City Arborist renders a preliminary decision regarding permit applications and if someone objects to the Arborist’s decision and files an appeal, then the Tree Commission conducts a fact finding hearing and renders a final decision on the application that either approves the permit, disapproves the permit, or approves the permit with modifications or conditions. If no one appeals from the Arborist’s preliminary decision within 15 days, the preliminary decision becomes final. The actual issuance of a permit is a ministerial act that must be performed in accordance with the final decision on the application. The only opportunities for the exercise of discretion lie with the Arborist at the preliminary decision phase and with the Tree Commission on appeal from the preliminary decision.

My interpretation of the Code is consistent with the plain language of the Code as it exists now and as it existed prior to the 2003 revision. When I started as Assistant City Attorney in 2000, this is how the Tree Commission, the City Attorney’s Office, and the Department of Public Works interpreted and applied the Code. I have litigated three judicial appeals of the Tree Ordinance, one of which was appealed to the Court of Special Appeals, and there has been no challenge to the existing interpretation of the law.

The Tree Permit Procedures proposed by Ms. Tunis are inconsistent with the express language of the Code and the intent of the Council and are impractical and unfair.

The language of the Code that Ms. Tunis cites in support of her interpretation of the Code, section 12.12.110.J, does not support her interpretation. That section provides as follows:

On appeal from the preliminary decision on a tree permit application, after due consideration of the evidence and testimony and the criteria for permit decisions set forth in Section 12.12.120, the Tree Commission shall issue its decision on the appeal and shall give notice to all interested parties.

Ms. Tunis is not clear as to how this provision supports her interpretation. However, even assuming that the foregoing section creates any doubt as to whether the Code vests final decision making authority with the Tree Commission, the following language, from section 12.12.120.A, confirms that the Tree Commission's decision is final:

The City Manager or, *upon appeal, the Tree Commission shall issue a tree permit* pursuant to Section 12.12.080(A) if so indicated by the factors set forth in subsection (B) of this section. Upon appeal, the Tree Commission shall, taking into account the factors set forth in subsection (B) of this section, approve the permit, disapprove the permit, or approve the permit with modifications and/or conditions.

Ms. Tunis's interpretation also is inconsistent with the remainder of the tree permit process established by the Code. The Code expressly authorizes persons aggrieved by a decision of the Tree Commission to appeal the Commission's decision to the Circuit Court for Montgomery County. The well established legal doctrine of exhaustion of administrative remedies prevents a party to an administrative proceeding from seeking a remedy in court until the party has pursued his or her claim to the full extent possible before the administrative agency. Failure to exhaust administrative remedies is grounds for immediate dismissal. The creation of a right to judicial review demonstrates that the Ordinance was intended to make the Tree Commission's decision final. If the Circuit Court interpreted the Code as allowing the Tree Commission to issue only preliminary decisions, subject to further appeal and review by the Commission, it would dismiss appeals of Tree Commission decisions. Allowing appeals of non-final Tree Commission decisions is also contrary to the well established collateral order doctrine, which restricts appellate courts to considering appeals of final decisions on the merits of a case.

Furthermore, the process proposed by Ms. Tunis is impractical. Under her proposal, opponents of a tree permit could forestall the issuance of a permit indefinitely because every time the Tree Commission issued a decision on an appeal authorizing the issuance of a permit, the Arborist would have to issue another preliminary decision, which would have to be posted for 15 days and could be appealed to the Tree Commission. Each cycle would add months to the process, as each preliminary decision must be posted for 15 days, the Tree Commission, which meets once a month, must schedule a hearing (with at least 15 days' notice under my proposed amendment), and then the Commission must issue a written decision, which typically takes from one to four weeks. The delays would increase exponentially as the Commission developed a backlog of hearings. Allowing multiple Tree Commission hearings would also greatly increase the cost of administering the Tree Ordinance, as the Arborist would have to post the property multiple times for a single permit application and I, as the Assistant City Attorney, would have to attend multiple hearings and draft multiple written decisions for the Commission for a single case.

Finally, the process proposed by Ms. Tunis is also unfair because when the Tree Commission denies a permit, the Commission's decision would be final. Permit applicants could appeal preliminary denials to the Tree Commission once. Opponents of Tree Permits could keep appealing the preliminary approval of a permit until the Commission denied the permit.

The proposed amendment corrects a procedural loophole and addresses the concerns of Ms. Tunis in a practical manner.

The Tree Commission requested the amendment to the Code presented to the Council on October 15 to ensure that the public had an opportunity to present evidence in support of a tree when an applicant appealed the preliminary denial of the permit. Based on Ms. Tunis's concern that Tree Commission hearings have often been held upon short notice and without notice to all who might be interested in a tree, the Ordinance presented to the Council for First Reading requires fifteen days' notice before a Tree Commission hearing and sets forth specific requirements regarding the posting, publication, and transmittal of such notice.¹

The notice requirement will ensure that anyone who is interested in a tree that is the subject of a Tree Commission hearing will be on notice that the Commission will decide the fate of the tree at the hearing and that, if they are opposed to the issuance of a tree permit, that they should present evidence in support of their position at the hearing. Ms. Tunis suggests that interested persons should be allowed to wait and see how the Commission rules on a case and then appeal the decision if they are unhappy with the decision. She further suggests that permitting multiple appeals to the Tree Commission would enable interested persons to watch the Commission's proceeding to become comfortable with the process and learn about the issues before filing their own appeal on the same case. She also suggests that allowing multiple appeals would enable persons who are too busy to prepare for a hearing or are unable to attend a hearing because of a scheduling conflict to file another appeal of the same case.

Administrative regulations can prescribe procedures for addressing cases where an interested person has a scheduling conflict with a scheduled hearing date. For example, the Commission on Landlord-Tenant Affairs requires written proof of a conflicting court date or written proof of travel plans. We should not allow people to delay the permit process by waiting to see whether they are satisfied with the Tree Commission's decision before participating in the process or demanding a new hearing because it was not convenient for them to participate in the first hearing.

Conclusion

The Council should proceed with the amendment of the Tree Ordinance to ensure that all interested persons have the opportunity to present their case to the Tree Commission regarding a tree permit application at a single hearing before the Commission. The Council should not amend the Ordinance to incorporate the procedures suggested by Ms. Tunis because those procedures would provide unequal treatment to permit applicants and permit opponents, would allow permit opponents to delay the permit process indefinitely and would increase the cost of administering the Tree Ordinance.

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¹ In the past, the Arborist has worked with the applicant and persons who filed a written appeal of the preliminary decision to arrange for a hearing date that is agreeable to those known interested parties.